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# **In the Supreme Court of the United States**

OCTOBER TERM, 1948

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No. 74

ST. REGIS PAPER COMPANY, PETITIONER

v.

THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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## **OPINION BELOW**

The opinion of the Court of Claims (R. 24-30) is reported at 76 F. Supp. 831.

## **JURISDICTION**

The judgment of the Court of Claims was entered on April 5, 1948 (R. 30). The petition for a writ of certiorari was filed on June 5, 1948. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended.

## **QUESTION PRESENTED**

Whether Schedule No. 1 to Paragraph (d) of General Preference Order No. M-251, issued by

War Production Board pursuant to the President's delegation to it of the allocation power vested in him by the Second War Powers Act, providing that no holder of pulpwood in the Puget Sound area "shall consume, process, or deliver any \* \* \* pulpwood," constituted a "taking" of petitioner's pulpwood plant, located in that area, so as to entitle petitioner to just compensation under the Fifth Amendment.<sup>1</sup>

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Second War Powers Act (54 Stat. 676, as amended by 56 Stat. 177, 50 U.S.C. App. 633, 1152); of WPB General Preference Order No. M-251 (7 Fed. Reg. 8424); and of Schedule 1 to Paragraph (d) to that Order (7 Fed. Reg. 8686) are set forth in the Appendix, *infra*, pp. 12-19.

#### STATEMENT

By amended petition filed in the Court of Claims on January 8, 1948, the St. Regis Paper Company,

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<sup>1</sup> Petitioner in its formulation of the question presented attempts to insert into the case the issue whether the United States should be required to pay just compensation for its inventory of pulpwood logs which it asserts was also requisitioned (Pet. 14). That question was not raised in the court below, and we submit, is not presented here. In the complaint filed below, the sole allegation relative to this inventory of logs is that petitioner was directed to deliver logs from its inventory to other mills (R. 6). The exhibits supporting this allegation indicate that petitioner was to be paid by the receiving mill "at regularly established prices and terms (subject to the regulations of the Office of Price Administration)" (R. 14-16). There is no allegation that petitioner complied with these orders, that it was not paid as there directed, or that these payments were not just compensation. Furthermore, the complaint contains no prayer for compensation for these logs.

the petitioner herein, sought to recover just compensation for an alleged taking of its pulpwood plant located at Tacoma, Washington (R. 1-23). The United States demurred (R. 23). The complaint alleged the following:

Petitioner owns a plant located in Tacoma, Washington, for the manufacture from pulpwood of approximately 300 tons of bleached and unbleached kraft pulp per day (R. 1). On October 26, 1942, the day on which the allocation order here involved was issued, and for some years prior thereto, petitioner was engaged in the business of manufacturing and selling bleached and unbleached kraft pulp, paper and other paper products (R. 1, 2). On that day, petitioner had at its plant an inventory of pulpwood logs, which is an essential raw material to its manufacturing process (R. 2). It also had a supply of these logs under contract for delivery for the continued operation of its plant at capacity production (R. 2).

In October 1942, the War Production Board, acting under Executive Order 9125 (7 Fed. Reg. 2719) delegating to it the allocation power vested in the President by Section 2(a) of Title III of the Second War Powers Act, Appendix, *infra*, p. 12, issued General Preference Order No. M-251, Appendix, *infra*, pp. 12-16, (R. 2-4). That order stated that the War Production Board was empowered to determine areas in which there existed a shortage of pulpwood required in the national

defense; to issue orders allocating and directing the distribution of the supply of pulpwood; and further to direct that certain persons to be specified might not consume, process, deliver, or accept delivery of such pulpwood (R. 3-4).

On October 26, 1942, the War Production Board issued Schedule 1 to Paragraph (d) of Order M-251, determining that there then prevailed in the Puget Sound Area in the State of Washington, the area in which petitioner's plant is located, a shortage of pulpwood needed for the defense of the United States (Appendix, *infra*, pp. 16-19; R. 5, 10-12). The schedule went on to provide that on and after October 26, 1942, and until the order should be revoked, no holder of pulpwood in that area was to "consume, process, or deliver any such pulpwood except upon specific authorization or direction" of the War Production Board (R. 5, 12). As a result, petitioner was not allowed to consume or process pulpwood in its plant from November 1, 1942 to April 1, 1944 (R. 7). Petitioner protested to the War Production Board against the application of this order to it, but its protest was rejected (R. 6-7). Petitioner accordingly had to shut down the plant during that period, since the plant could not be operated, or used for any purpose other than the manufacture of kraft pulp (R. 2, 7-8).

In its complaint in the court below, petitioner claimed this order constituted a temporary requisition of its plant for the use and benefit of the United

States, and contended that the Government had become obligated under the Fifth Amendment to pay, as just compensation for that taking, the out-of-pocket expenses it incurred during the shut-down period, the plant deterioration and depreciation charges, and the profits it failed to earn during that period (R. 8-9). The court below, in sustaining the demurrer of the United States (R. 30), held that petitioner's allegations failed to establish that its property had been taken (R. 25-30). Accordingly, it dismissed the complaint (R. 30).

#### ARGUMENT

Petitioner does not question that the power to allocate materials and facilities, which the Congress by Section 2(a)(2) of Title III of the Second War Powers Act, Appendix, *infra*, p. 12, vested in the President, involves a constitutional exercise of the war power, or that the delegation of that power to the War Production Board, the agency designated by the President to exercise that phase of the power here involved, was proper. Cf. *Steuart & Bros. v. Bowles*, 322 U. S. 398. Rather, petitioner's claim is predicated on the novel theory that when the War Production Board (and the various other agencies also designated to exercise that power in specific phases of the national economy<sup>2</sup>) exercised the power to allocate materials

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<sup>2</sup> The War Food Administration, the Petroleum Administration for War, and the Office of Price Administration also allocated scarce materials.

in the interests of national defense and security, these agencies were engaged in requisitioning property from private individuals for public use, and that, therefore, the individuals denied materials by reason of such allocations to others are entitled to just compensation under the Fifth Amendment. The holding below rejecting that claim is, we submit, correct and in accord with established principles.

1. Although the allocation order here involved denying petitioner the pulpwood it needed to operate its plant was only one of hundreds of similar allocation orders affecting virtually all phases of industrial activity and business issued by various agencies of the Government during World War II, petitioner recognizes that there are no other cases in which the contention it advances here has been sustained (Pet. 28). There is good reason why no such cases are available, since the situation here involved is governed by the long established rule that when governmental power, such as the war power of the Federal Government or the police power of a state, is legitimately exercised for the public good, and injury is suffered as an incident thereto, there is no taking of property for public use compensable under the Fifth Amendment. *Block v. Hirsch*, 256 U. S. 135; *Bowles v. Willingham*, 321 U. S. 503; *Woods v. Miller Co.*, 333 U. S. 138; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155-158; *Omnia Commercial Co. v. United States*, 261 U. S. 502; *United States v. Carver*, 278 U. S. 294; *Trans-*



*portation Co. v. Chicago*, 99 U. S. 635; *Morrisdale Coal Co. v. United States*, 55 C. Cls. 310, 316, affirmed, 259 U. S. 188; *Royal Holland Lloyd v. United States*, 73 C. Cls. 722.

The allocation orders issued during World War II were designed to effectuate the distribution of scarce materials and products of all kinds among competing military and civilian demands and to insure the prompt, efficient, and adequate flow of shortage materials to the armed forces, to our allies, and to the home front. In order to attain these objectives, it was often imperative to withdraw or reclaim allocations granted, or to reallocate because of a changed military situation or a change in legitimate consumer demands. See Brief for Respondents in *Steuart & Bros. v. Bowles*, No. 793, Oct. T., 1943, pp. 18-21; O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. Law Rev. 1, 7.<sup>3</sup>

Although these allocation orders affected normal peacetime activities and resulted in some instances in very substantial financial losses, such damages were only incidental to the overall objective of so organizing our economy as to enable the United States to "wage war successfully." *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 426; *Hirabayashi v. United States*, 320 U. S. 81, 93; see

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<sup>3</sup> Contrary to petitioner's suggestion (Pet. 29), the authors of this article did not express the view that the allocation orders issued by the War Production Board, including the "M" series here involved, resulted in a taking of private property for public use compensable under the Fifth Amendment.

*Lichter v. United States*, No. 105, Oct. T. 1947, decided June 14, 1948. Any financial losses which ensued were "damnum absque injuria \* \* \* private interest has merely come into collision with a public interest, and has had to yield." *Brown v. Wilemon*, 139 F. 2d 730, 732 (C.C.A. 5), certiorari denied, 322 U. S. 748; cf. *Gallagher's Steak House v. Bowles*, 142 F. 2d 530 (C.C.A. 2), certiorari denied, 322 U. S. 764; *Shreveport Engraving Co. v. United States*, 143 F. 2d 222 (C.C.A. 5), certiorari denied, 323 U. S. 749; *Gray v. Commodity Credit Corp.*, 63 F. Supp. 386, 396 (S. D. Cal.), affirmed, 159 F. 2d 243 (C.C.A. 9), certiorari denied, 331 U. S. 842; see also, *Block v. Hirsch*, *supra*; *Bowles v. Willingham*, *supra*; *Woods v. Miller Co.*, *supra*. As was pointed out in *Steuart & Bros. v. Bowles*, *supra*, at 405:

Certainly we could not say that the President would lack the power under this Act to take away from a wasteful factory and route to an efficient one a precious supply of material needed for the manufacture of articles of war. That power of allocation or rationing might indeed be the only way of getting the right equipment to our armed forces in time. From the point of view of the factory owner from whom the materials were diverted the action would be harsh. He would be deprived of an expected profit. But in times of war the national interest cannot wait on individual claims to preference. The waging of war and the control of its attendant economic problems are urgent business.

Or, again, as this Court said just the other day in *Lichter v. United States*, *supra* (p. 11 of slip opinion:

In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself.

2. Petitioner's claim is also untenable for the reason that there was no actual taking of any right in its property. As pointed out by the court below, there is a complete absence of "any showing that [petitioner's] plant did not remain at all times within its own exclusive ownership, possession, and control, or that the Government had any semblance of ownership, possession, or use of the property" (R. 29). Accordingly, there was no actual physical taking of any right in petitioner's property, and hence petitioner's property was not "taken" in the Fifth Amendment sense so as to entitle it to compensation thereunder. *Transportation Co. v. Chicago*, 99 U. S. 635, 642; *Gibson v. United States*, 166 U. S. 269, 275-276; *Scranton v. Wheeler*, 179 U. S. 141, 154-155; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156-157; *Atwater & Co. v. United States*, 275 U. S. 188, 190-191.<sup>4</sup>

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<sup>4</sup> The various cases cited by petitioner, such as *United States v. Causby*, 328 U. S. 256; *Portsmouth Company v. United States*, 260 U. S. 327, and *International Paper Co. v. United States*, 282 U. S. 399 (Pet. 17-23), are all distinguishable since in each of these cases there was an actual taking of an interest in the plaintiff's property.

Nor is there any substance to petitioner's further contention that since Schedule 1 forbade it to consume, process, or deliver any pulpwood and it was thus compelled to shut down its pulpwood plant, the plant not being usable for any other purpose except storage, there was such a destruction of its "rights to process and consume pulpwood" (R. 8) and to use and operate its plant as to amount to a "taking" compensable under the Fifth Amendment (Pet. 24). For the "destruction" rule applies, as stated in *United States v. General Motors Corp.*, 323 U. S. 373, 378, only when the effects of the governmental action short of acquisition of title or occupancy are so complete as to deprive the owner of all or most of his interest in the subject matter. Cf. *United States v. Petty Motor Co.*, 327 U. S. 372. Here all that the Government did was to forbid petitioner to acquire or process pulpwood and this denial merely resulted in the closing down of petitioner's plant. Neither all or any part of petitioner's plant was destroyed, nor was petitioner's exclusive possession or occupancy thereof disturbed at any time during the period of the alleged taking. In these circumstances, there clearly was no such destruction of petitioner's plant as to amount to a "taking" compensable under the Fifth Amendment.

## CONCLUSION

The decision below is clearly correct, and there is no conflict with any applicable decision of this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1948.

## APPENDIX

1. The Second War Powers Act, 54 Stat. 676, as amended by 56 Stat. 177, 50 U.S.C. App. 633, 1152, provided in pertinent part:

Sec. 2(a) \* \* \* \* \*

(2) \* \* \* Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

2. General Preference Order No. M-251 of the War Production Board (7 Fed. Reg. 8424) provides in pertinent part:

The fulfillment of requirements for the defense of the United States has created in certain areas and is expected to create in other areas a shortage in the supply for defense, for export and for private account, of wood for pulp and lumber, and has created a shortage in the supply for defense, for export and for private account of various materials and facilities required for the production of pulpwood; and the following order is deemed necessary and appropriate in the public interest and to promote national defense:

§ 3113.1 *General Preference Order M-251-*  
(a) *Applicability of priorities regulations.*

This order and all transactions affected thereby are subject to all applicable provisions of the priorities regulations of the War Production Board, as amended from time to time.

(b) *Definitions.* For the purpose of this order:

(1) "Person" means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons, whether incorporated or not.

(2) "Pulpwood" includes wood of any species and in any form commonly delivered to a manufacturer of woodpulp for the manufacture of woodpulp, except those species and forms defined in and subject to the following orders of the War Production Board: M-186, M-228, M-229 and M-234.

(3) A "holder of pulpwood" is any person who holds or accumulates pulpwood for manufacture by himself into woodpulp.

(4) To "hold" or "accumulate" pulpwood means to have or obtain control of a supply of pulpwood whether by production or purchase directly by the holder, by production or purchase by an affiliate or subsidiary or by one branch, division or section of a single enterprise or by production or purchase by any other person for delivery to or for the account of the holder.

\* \* \* \* \*

(d) *Control of pulpwood in areas of shortage.* Whenever the Director General for Operations determines that there prevails in any area a shortage in the supply of any type or types of pulpwood required for the production of materials needed in the public interest and for national defense, he may issue a schedule defining such area and such type or types of pulpwood, and may thereupon, according to the degree of the shortage and the immediacy of the need, and as specified in such schedule,

(1) Allocate specific quantities of pulpwood of the type or types defined held or accumulated in such area from and to specific persons;

(2) Direct holders of pulpwood in such area to maintain in their holdings or accumulations of pulpwood of the type or types defined a stated quantity or percentage, either uniform for all such holders or particular for any, to be known as a "Reserve Supply", available for disposition by the Director General for Operations, from which the Director General for Operations may from time to time authorize or direct the delivery of specific quantities to specific persons and/or the manufacture of specific quantities into the specific products, and the Director General for Operations may in addition from time to time allocate specific quantities of any pulpwood of the type or types defined held or accumulated in such area, although not a part of such "Reserve Supply", from and to specific persons; and provide procedures for applying for and



granting such authorizations, directions and allocations;

(3) Direct that no person, or no person of a specified class, may consume, process, deliver or accept delivery of any pulpwood of the type or types defined held or accumulated in such area except upon specific authorization or direction by the Director General for Operations, and provide procedures for applying for and granting such authorization or direction; and/or

(4) Limit or prohibit particular uses of pulpwood of the type or types defined held or accumulated in such area. In any allocation, authorization or direction issued by the Director General for Operations pursuant to clause (1), (2) or (3) of the foregoing paragraph, the Director General for Operations may require the person to whom such allocation, authorization or direction is issued to manufacture, from the pulpwood which is the subject thereof, particular types and quantities of woodpulp or other wood product or impose upon the use of such pulpwood by such person any other conditions necessary and appropriate in the public interest and for national defense. Such allocations, authorizations and directions and any conditions attached thereto, and any limitations or prohibitions issued pursuant to clause (4) of the foregoing paragraph, shall be made to insure the satisfaction of requirements, direct and indirect, for the defense of the United States and for essential civilian supply, may be made

in consideration of the possible dislocation of labor, the effect of the local shortage on the national supply of products manufactured from pulpwood and woodpulp, the problems of transporting such products into and out of the area defined, and the necessity of keeping a plant in operation so that it may be able to fulfill war orders and essential requirements, and may be made in the discretion of the Director General for Operations, without regard to preference ratings.

3. Schedule 1 to Paragraph (d) of Order No. M-251 (7 Fed. Reg. 8686) provides:

§ 3113.2 *Schedule 1 to paragraph (d) of General Preference Order M-251.* Pursuant to paragraph (d) of General Preference Order M-251, the Director General for Operations hereby determines that there prevails in the following area a shortage in the supply of the following type(s) of pulpwood required for the production of materials needed in the public interest and for national defense:

*Area.* That portion of the State of Washington, known as the Puget Sound area, which is described as follows: bounded on the West by the Pacific Ocean, bounded on the north by the Canadian Border, bounded on the east by the crest of the Cascade Mountain Range and bounded on the south by a line having the following course: east from the Pacific Ocean along north boundary of township 11 to range line between Townships 7 and 6 East; then south 3 miles; then east through Range 6 to

Pacific County line; then south along Pacific County line to southern boundary of Lewis County line; then east along southern boundary of Lewis County line through Ranges 5 West and 4 West, and east 3 miles to center of Range 3 West; then north 3 miles through Range 3 West; then east through remainder of Range 3 West and through Range 2 West; then north on the range line between Range 2 West and Range 1 West to northern boundary of Township 11; then east along northern boundary of Township 11 through Range 1 West, Range 1 East, and Range 2 East; then south 3 miles on range line between Range 2 East and Range 3 East; then east through the center of townships in Ranges 3, 4 and 5 East; then south 3 miles to southern boundary of Lewis County line; then east on Lewis County line to the crest of the Cascade Mountain Range.

*Type(s) of pulpwood.* All grades and sizes of pulpwood logs of the following species (excepting cants, slabs or other sawmill waste):

(1) True firs of the botanical species: *Abies grandis* (white fir), *Abies Lasiocarpa* (balsam fir), *Abies amabilis* (silver fir) and *Abies concolor* (white fir).

(2) Sitka spruce of the botanical species: *Picea sitchensis*, except those grades of logs specified by the War Production Board under General Preference Order M-186 as "Sitka spruce logs, Grades No. 1 and 2 and cants and flitches of such logs". General Preference

Order M-186 defines "Grades No. 1 and No. 2, Sitka spruce logs" as such grades as understood in the particular district on August 1, 1941.

(3) Engelmann spruce of the botanical species: *Picea Engelmannii*.

(4) Western Hemlock of the botanical species, *Tsuga heterophylla* and *Tsuga mertensiana*, except the log grade specified by the War Production Board under General Preference Order M-229 as "Western Hemlock aircraft logs". General Preference Order M-229 defines "Western Hemlock aircraft logs" as "Logs of the botanical species of *Tsuga mertensiana* or *Tsuga heterophylla* (including cants and flitches of such logs), which are produced in those parts of Oregon and Washington lying west of the crest of the Cascade Mountain Range, or in Alaska, and which meet the following specifications:

(i) Are from stands of timber of approximately 1,200 feet or higher elevation and are medium to light in weight;

(ii) Are not less than 26 inches top diameter and not less than 12 feet long;

(iii) Are of straight grain so that the majority of the clear lumber can be produced with a slope of grain not greater than 1 in 15;

(iv) Are free of deep bark seams or other defects with the clear portion of the log;

(v) Have reasonably uniform annual rings, not fewer than eight to the inch within the clear portion of the log; and

(vi) Are of a character which will produce at least 50% No. 2 Clear and Better, or B and Better Clear lumber”.

Pursuant to subparagraph (3) of paragraph (d) of said order, the Director General for Operations hereby directs that on and after the day upon which this schedule is issued, and until this schedule is revoked, no holder of pulpwood, as defined in subparagraph (3) of paragraph (b) of M-251, shall consume, process, or deliver any such pulpwood except upon specific authorization or direction by the Director General for Operations.

Application for authorization or direction to consume, process or transfer such pulpwood may be submitted on Form PD-556.